Supreme Court, U.S.
FILED
NOV 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-726

In The

Supreme Court of the United States

October Term, 1989

ACRISON, INC.,

Petitioner,

vs.

JOHN HITESMAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this products liability case, the jury answered special verdict questions finding that the product as sold by the Defendant was defective and that Plaintiff's injuries had been caused by this defect. As an affirmative defense, the Defendants attempted to shift responsibility for the defective product to Plaintiff's employer, who had placed the defective product in service upon a production line designed by the employer. Before this affirmative defense becomes applicable under Pennsylvania law, the Defendant must obtain a factual determination that the machine at issue was the product of substantial work by more than one party. No question was asked concerning this issue of fact. The District Court, therefore, applied Rule 49(a), Fed.R.Civ.Proc., to make a finding on this omitted issue of fact. The Court of Appeals agreed that Pennsylvania law required the omitted factual issue to be decided before the defense applied, and held that the District Court had properly framed the missing question and properly supplied an answer to it.

QUESTION PRESENTED:

WHERE FACTUAL QUESTIONS CONCERNING AN AFFIRMATIVE DEFENSE WERE SUBMITTED TO THE JURY BUT A THRESHOLD ISSUE OF FACT ESSENTIAL TO THE DEFENDANT'S AFFIRMATIVE DEFENSE WAS NEVER REQUESTED BY EITHER PARTY OR SUBMITTED BY THE COURT, IS IT PROPER FOR THE COURT TO FRAME AND ANSWER A QUESTION ON THIS OMITTED ISSUE OF FACT?

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STATEMENT OF THE CASE

On September 4, 1987, Plaintiff, John Hitesman, commenced this case against Defendant, Acrison, Inc. Mr. Hitesman's Complaint set forth that on September 6, 1985, while cleaning a volumetric feeder manufactured and sold by the Defendant, Plaintiff had sustained serious injuries which had required years of reconstructive surgeries, and had caused a physical deformation of his hand and a permanent disability. Mr. Hitesman's claims were based upon products liability and set forth that the volumetric feeder and hopper chamber were defective because they lacked adequate safety devices and warnings. Mr. Hitesman specifically claimed that the volumetric feeder was defective because it lacked an interlocked guard.

In an Amended Answer, Defendant asserted as an *affirmative defense* that the volumetric feeder was a component part of a production line designed and manufactured by Mr. Hitesman's employer, and that Mr. Hitesman's employer and not Defendant was the party properly responsible for installing the safety guard. (A 12; A 30). The Defendant referred to this as the "component part defense."

Throughout the case, Plaintiff had maintained that the "component part defense" did not apply to the facts of the present case because the Defendant was the only party involved in the design and manufacture of the volumetric feeder, and that it was the volumetric feeder which was at issue in this case, and not the production line.

The trial was bifurcated into liability and damage phases, both phases being tried to the same jury. The case was subject to the laws of Pennsylvania as interpreted by state and federal courts. (A 12). In response to the special verdict questions, the jury answered as follows:

> 1. Did Acrison sell the volumetric feeder involved in the injuries to Plaintiff, John Hitesman?
>
> *Yes.*
>
> 2. Was the volumetric feeder at issue in this case defective at the time it left Acrison's control because it lacked an interlocked guard?
>
> *Yes.*
>
> 3. If your answer to the previous question is "yes," is the absence of an interlocked guard a substantial factor in bringing about and actually causing John Hitesman's injuries?
>
> *Yes.*

In order to establish liability, Mr. Hitesman had to establish that Acrison had manufactured the volumetric feeder, that the volumetric feeder was defective at the time it left the control of the Defendant and that this defect was a substantial factor in causing his injuries. As found by the jury and as affirmed by the Court, the evidence established liability against the Defendant. (A 23).

While the facts found by the jury which imposed liability upon the Defendant focused upon the volumetric feeder, the Defendant attempted in its question on the "component part defense" to focus upon the fact that the volumetric feeder was incorporated into a production line, which production line required the addition of other

machinery by Plaintiff's employer. The special verdict question which the Defendant claimed established its "component part defense" reads as follows:

> 9. Was the volumetric feeder sold by Acrison to Frito-Lay merely a component part of a production system to be completed by the addition of other machinery by Frito-Lay?
>
> *Yes.*

After returning the special verdict questions, the Trial Court requested the parties to submit briefing on the issue of in whose favor judgment should be entered on the special verdict returned by the jury. After extensive briefing, the Court entered judgment in favor of Mr. Hitesman, finding that the jury's answers established that Acrison had sold the volumetric feeder which was defective at the time it left Acrison's control and that this defect was a substantial factor in causing Mr. Hitesman's injuries. With regard to Acrison's "component part defense," the Trial Court found that the parties had failed to submit any question on an essential factual determination concerning this defense.

> Special Verdict Question No. 9 misses the point. The proper inquiry for the purpose of component parts defense, should have been the volumetric feeder alone. The jury should have been asked the question:
>
> Was the volumetric feeder including the hopper the result of substantial work by more than one party?
>
> Neither Acrison, nor John Hitesman, proposed such a special verdict question.

(A 14-15). Because this essential factual determination was omitted from the special verdict questions, the Court

found that each party had waived a right to trial by jury on it pursuant to Fed.R.Civ.P. 49(a). Applying Rule 49(a), the Court found that the volumetric feeder, including the hopper, was not the product of substantial work by more than one party.

On October 31, 1988, Acrison filed a Motion for Reconsideration of the Court's October 21, 1988, Opinion and Order, and a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for an Order Granting a New Trial. At no point in these motions or the briefing filed in support of these motions did Defendant ever raise or argue that the Trial Court had improperly applied Rule 49(a). In fact, in its motion and brief on the Motion for Reconsideration, Defendant specifically asked the Court to amend its factual determination that the volumetric feeder was not the product of substantial work by more than one party.

> Acrison has asked us to amend our opinion and order and rule that the volumetric feeder that injured John Hitesman was in fact the product of substantial work by more than one party. Upon making this proposed ruling, Acrison urges us to enter judgment in its favor.

(A 19).

The Defendant took an appeal to the Third Circuit claiming that special verdict questions 9 through 11 established Defendant's "component part defense" and that the Trial Court had improperly applied Rule 49(a).

In its Opinion, the Third Circuit agreed with the Trial Court and found that the special verdict questions simply did not include a "threshold question which must be answered." (A 33). The Court noted that "the jury was

not given any question asking whether the feeder was the product of substantial work by more than one party" and that it was therefore proper under Rule 49(a) for the Trial Court to make a finding on this omitted issue of fact. In so holding, the Court stated:

> The issue on which this case was tried was not whether the production line was defective, but whether the feeder was defective for failure to incorporate an interlocked guard. Before it could avail itself of the component part defense, Acrison had to get a factual determination that work on the feeder was done by more than one party. This resolution was essential to Acrison's defense and the application of the *Verge* factors. The District Court did not err in framing the missing question and supplying an answer to it.

(A 35). While the Court of Appeals used the word "reframe" in its Opinion, the Court of Appeals made clear that the basis of its holding was that no question was submitted to the jury on the omitted issue of fact, that the agreed-to questions submitted simply did not address this essential issue of fact, and that the District Court properly framed the missing factual question and properly supplied an answer to it.

Finally, in Petitioner's statement of facts there are inaccurate and misleading assertions. First, the Defendant asserts at pages 8 and 10 of its Petition that the Court excluded its proposed Question 9 and specifically Petitioner states:

> Furthermore, the District Court had earlier ruled that the phrase "incomplete product" made the same factual inquiry as Acrison's proposed question 9, which would have explicitly

> asked the jury whether Frito-Lay made "substantial changes and additions" to the feeder.

(Petition for Writ of Certiorari, p.10). This assertion by the Defendant is simply wrong and misinforms the Court as to what occurred. The following portion of the record shows that Defendant was solely responsible for the exclusion of proposed question 9.

> THE COURT: Well let's see what 10 is then. Are the volumetric feeders sold by Acrison incomplete products that are part of a production system to be completed by the addition of other machinery by Frito-Lay or others over which Acrison had no control? Well, why is that important?
>
> MR. FORNARI: Why is that what? I'm sorry, Your Honor.
>
> THE COURT: Why is that important?
>
> MR. FORNARI: Well, I think that 9 and 10 are really two versions of the same question. We tried to put them in different form.
>
> THE COURT: Well, gees, if we get two versions of the same question you're inviting an inconsistent verdict. If it's one question we ought to be able to do it that way.
>
> MR. FORNARI: All right. I would be – either one of those.
>
> THE COURT: All right. Well, you pick which one you want us to put in and we'll throw the other one out at this point.
>
> MR. FORNARI: Let's take 10.
>
> THE COURT: Do you want 10 rather than 9?
>
> MR. FORNARI: Yes, sir.

THE COURT: All right. Defendant wants 10 in place of 9 and 10. All right. Now –

(As set forth in the Joint Appendix submitted to the Court of Appeals at A 694-695).

At page 8 of the Petition, the Defendant sets forth a proposed point for charge submitted by the Plaintiff. Unfortunately, the Defendant has failed to include the entire proposed point. First, at the beginning of this point for charge Plaintiff stated unequivocally that Defendant's so-called "component part defense" was simply not applicable in the present case. Second, Petitioner omitted the final paragraph of this point for charge which states:

> If you find the volumetric feeder was a substantially finished product when sold by Acrison, then the law holds that the manufacturer or seller of the product has the responsibility to provide necessary safety devices or warnings. In other words, if you find the volumetric feeder was a substantially finished product when sold by Acrison, the issue regarding safety devices is limited solely to whether the volumetric feeder lacked any element necessary to make it safe for its intended or foreseeable use at the time it was sold by Acrison.

(As set forth in the Joint Appendix submitted to the Court of Appeals at A 1279).

Finally, Petitioner asserts that the jury's answer to special verdict question 9 was a finding that the volumetric feeder was merely a component part which was to be completed by the addition of other machinery by Frito-Lay. (Petition, p. 5). What this question establishes is that the "volumetric feeder . . . [was] merely a component part of a production system to be completed by the addition of other machinery by Frito-Lay." The fact that

the volumetric feeder was to be incorporated into a production line where other separate machinery was added had absolutely nothing to do with whether the product was manufactured by several parties or was the result of substantial work by more than one party. It does show that the production line was the result of substantial work by more than one party; but, as found by the Trial Court and the Third Circuit, the product at issue in this case is a volumetric feeder and not a production line. As found by the Court of Appeals, absent a determination that the volumetric feeder was the product of substantial work by more than one party, Defendants' affirmative defense "does not apply" and the factors set forth in questions 9 through 12 are irrelevant. (A 34).

REASONS FOR DENYING THE WRIT

THE INTERROGATORIES GIVEN TO THE JURY DID NOT INCLUDE A FACTUAL QUESTION ESSENTIAL TO ACRISON'S DEFENSE. THE CONSEQUENCE UNDER RULE 49(a) OF SUCH A FACTUAL OMISSION IS THAT THE RIGHT TO HAVE THAT FACT ISSUE DETERMINED BY THE JURY IS WAIVED AND IT IS THE COURT'S RESPONSIBILITY TO MAKE SUCH A FINDING. THE APPLICATION OF RULE 49 IN THIS CIRCUMSTANCE PRESENTS NEITHER AN IMPORTANT QUESTION OF FEDERAL LAW NOR A DECISION CONFLICTING WITH THE OPINIONS OF OTHER CIRCUITS.

1. THE CASE INVOLVES NO IMPORTANT QUESTIONS OF FEDERAL LAW.

The record facts and the law applicable to the present case demonstrate that the jury was never given any question on a factual issue which was essential to the affirmative defense asserted by the Defendants. Where such a

factual question is omitted from the special interrogatories submitted to the jury, Rule 49(a) states that the parties have waived their right to a trial by jury on this omitted issue of fact and the Federal District Court may make a finding on this omitted issue of fact. This is precisely what was done in the present case and despite the Petitioner's semantic arguments, the present case involves a simple and straightforward application of Rule 49(a).

Under Rule 49, the burden of securing the jury verdict on all the material issues of fact is placed squarely upon the parties. *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 915 (lst Cir. 1988). Rule 49 clearly informs the parties that jury trial will be waived as to any issues of fact not submitted. Trial by jury on an issue of fact is only lost when a party fails to demand that the omitted issue of fact be submitted to the jury. *Id.*, at 916. Waiver of a jury trial occurs not by edict of the Court, but by virtue of the parties' failure to demand a submission of the issue of fact to the jury. Where a party agrees to the special interrogatories submitted, he cannot later complain when it is found that a question of fact has been omitted. If the rule were not so read, a party could, as did the Defendant in the present case, agreeably acquiesce to perceivable error and then lie in wait and ask for another trial when the result is not to his liking. *Id.*, at 918.

The present case involves a case of strict products liability. Under Pennsylvania law as interpreted by the State and Federal Courts, a unique affirmative defense exists under products liability whereby if the Defendant manufacturer can prove that the product at issue was the result of substantial work by more than one party, the

Defendant can look to factors such as relative expertise and practicality to establish that another party which made substantial contributions to the finished product was responsible for the defect. This defense was originally set forth in the case of *Verge vs. Ford Motor Co.*, 581 F.2d 384 (3d Cir. 1978), and is often referred to as the *Verge* defense. However, a necessary factual predicate for the application of this defense is that several parties made substantial contributions to the creation of the defective product. Absent this factual predicate, there is simply no basis for even considering this defense. (A 34-35); see, *Heckman v. Federal Press Co.*, 587 F.2d 612, 617 (3d Cir. 1978); *Holloway v. J. B. Systems. Ltd.*, 609 F.2d 1069, 1073 (3d Cir. 1979). Therefore, in order for the Defendant to have the jury consider the factors involved in this specialized defense, the Defendant initially had to obtain a factual determination that the volumetric feeder, the product at issue, was the result of substantial work by more than one party.

As found by the Trial Court and the Court of Appeals, this factual issue was simply never submitted to the jury in the interrogatories agreed to by the parties. (A 15; A 32). The Court of Appeals, therefore, held that it was not only correct, but necessary, for the Trial Court to frame a question and supply an answer to this omitted issue of fact. (A 35).

Despite the Court of Appeals' clear holding that no question was submitted to the jury on the omitted issue of fact, the Defendant claims that the use of the word "reframe" in the earlier portions of the Opinion indicates that the issue of fact was submitted to the jury and that the jury's factual determination was "set aside." (Petition

for Writ of Certiorari, p. 13). The question which the Defendant argues demonstrates that this issue of fact was submitted to the jury reads as follows:

> 9. Was the volumetric feeder sold by Acrison to Frito-Lay merely a component part of a production system to be completed by the addition of other machinery by Frito-Lay?

It beggars reason to argue that this question even remotely addresses the factual issue of whether the volumetric feeder was the result of substantial work by more than one party. At most, this finding of fact establishes that the volumetric feeder was a component of a production line to be completed by the addition of other machinery by Frito-Lay. However, as stated by the Third Circuit,

> The issue on which this case was tried was not whether the production line was defective, but whether the feeder was defective for failure to incorporate an interlocked guard.

(A 35). There was absolutely no reason to set aside the finding of fact made in question 9, since this finding simply does not address the omitted issue of fact. The Defendant's argument completely ignores the rationale and basis set forth in the final two pages of the Third Circuit's Opinion. The Opinion demonstrates that the Court clearly understood that the relevant issue of fact was completely omitted from the interrogatories submitted to the jury, that the questions submitted by the Defendants simply did not address this issue, that neither party requested this issue of fact be submitted to the jury, and that the District Court did not err in applying Rule 49 when making its finding on this omitted issue of fact. (A 34-A 35).

The Defendants also argue that their proposed question No. 9 was excluded by the Court and that this question "would have explicitly asked the jury whether Frito-Lay made 'substantial changes and additions' to the feeder." First, this argument is simply irrelevant since a party which agrees to the questions and the form of questions submitted to the jury cannot later complain that an issue of fact was not submitted to the jury. Second, the Trial Court did not rule that proposed question No. 9 made the same factual inquiry as proposed question No. 10, but rather the Defendant asserted to the Court that proposed questions 9 and 10 were two versions of the same question and Defendant specifically chose to submit only proposed question 10. Finally, proposed question 9, as set forth at page 7 of the Petition, concerns whether the Defendant expected Frito-Lay's personnel to make changes or additions to the switching and power to the volumetric feeder after it was sold. There was no dispute in this case that Acrison sold its volumetric feeders without a power cord and a switch to turn the machine on and off. However, every physical piece of the volumetric feeder was designed and manufactured by Defendant Acrison and other than the complete lack of safety devices, the only thing necessary to make the volumetric feeder operational was the supply of power to the motor. This question, therefore, would have merely asked the jury to answer "yes" to uncontested factual issues and would have in no way resolved the essential factual determination of whether the volumetric feeder was the product of substantial work by more than one party.

The record demonstrates, as found by both the Trial Court and the Court of Appeals, that the parties simply failed to address, let alone demand, that any question be submitted to the jury on whether the volumetric feeder was the result of substantial work by more than one party. Where a party has agreed to the interrogatories submitted to the jury, the party cannot be heard later to complain when the Court properly applies Rule 49(a) to make the omitted factual determination. While the present case involves such an improper, after-the-fact complaint concerning an omitted issue of fact, it does not involve an important question of federal law on which there is any dispute.

2. THERE IS NO CONFLICT IN THE CIRCUITS.

As to Defendants' claim that there is a conflict in the Circuits, a brief review of the case law will demonstrate the baselessness of this assertion. At pages 13 and 14 of its Petition, the Defendant lists cases where Rule 49(a) was applied and the Courts made factual determinations with regard to significant and essential factual issues which controlled whether liability could be imposed. In all these cases, the jury was instructed and asked factual questions on issues of liability and applicable defenses; however, in each case, an essential factual issue concerning liability or a defense was never submitted to the jury.

For example, the Second Circuit in *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir. 1987), submitted the issue of enterprise and the participation of the defendants in the enterprise to the jury. However, the jury was only permitted to answer questions concerning participation in an

enterprise which included the defendant county and not an enterprise which only included three other defendants. The Appeals Court believed that if the jury had been asked about the participation of three of the defendants in an enterprise which included only themselves and not the county, RICO liability could have been established. The District Court had refused the plaintiff's request to make factual findings on this omitted enterprise theory. In vacating and remanding the District Court's decision, the Court of Appeals stated as follows:

> Rule 49(a), however, required the Court only to make a finding on this issue as a matter of fact. The ultimate question after trial is whether or not the plaintiff has proved its claim. If the interrogatories given to the jury do not include the factual question needed for a complete answer to the ultimate question, the consequence under Rule 49(a) is not that the plaintiff's case is to be dismissed, but simply that the right to have that fact issue determined by the jury is waived and any gap is to be filled in by the Court.

Id., at 731. While the issue of enterprise was clearly submitted to the jury, the issue of fact with regard to the specific enterprise was omitted. The Court, therefore, held that it was proper for the Trial Court to frame a question with regard to this enterprise, and to make a finding on this omitted issue of fact. In the present case, in order for the Defendant to pursue its "component part defense," it had to obtain a factual determination that the volumetric feeder was the result of substantial work by more than one party. This issue of fact was simply not submitted to the jury, and in keeping with the proper application of Rule 49(a), as in *Cullen*, the Court was

required to and did make a finding on this omitted factual issue.

The Fifth Circuit in *Harmon v. Grande Tire Co.*, 821 F.2d 252 (5th Cir. 1987), confronted a case in which the jury was specifically charged on liability under two separate statutory sections. However, the question submitted to the jury relating to this charge, while addressing the defendant's liability under one section, failed to address the defendant's liability under both sections. The defendant attempted to argue that by virtue of the charge the question of violation of this section was implicitly included within the questions submitted to the jury. The Court found that this question was simply not asked and that the Court must address itself to the literal questions asked to the jury and not what one party or another intended to be asked. In *Harmon*, as in the present case, the question is not what issues of fact a party or parties believed, hoped, or wished were included in the specific questions submitted to the jury, but what issues of fact were or were not specifically asked.

The Tenth Circuit in *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324 (10th Cir. 1984), reviewed a case where the jury had been asked questions with regard to liability under contract and negligence theories, a question with regard to the amount of damages suffered, and a question with regard to allocation of damages under the negligence claim. However, the jury had not been asked to allocate the overall damages under the contract claim. Defendant argued that the allocation of the overall damages under the negligence claim indicated that the jury had allocated damages solely to a negligence claim. The Court noted that the interrogatories simply did not ask

the jury to determine the amount of damages sustained on each claim, and that it was, therefore, proper for the Court to supply a finding on this omitted issue of fact.

The First Circuit in *Anderson v. Cryovac. Inc.*, 862 F.2d 910 (lst Cir. 1988), discussed Rule 49 in a situation where an interrogatory submitted to the jury would ordinarily have required the jury to make a determination on the omitted issue of fact. *Id.* at 917. However, because of the compound conjunctive nature of the question submitted to the jury, there was no clear-cut factual submission to the jury on the essential issue of fact. The Court found that the plaintiff failed to object to the proposed interrogatory and made no objections at side bar to the interrogatory. The Court noted that it was the burden of the parties to assure that all of the issues of fact were squarely presented to the jury and that if the questions omitted any material issue of fact, it was proper for the Court below to find the facts which had been omitted. The Court specifically held that there was no denial of the parties' right to trial by jury since waiver only occurred when a party failed to exercise its right to demand submission of an omitted issue of fact.

As the above cases demonstrate, under Rule 49, where there exists an omitted issue of fact, the only issue relevant to whether the District Court should make a finding with regard to this omitted issue is whether the party has demanded submission of this specific issue of fact to the jury. Where no such demand has been made and the party has agreed to the interrogatories submitted to the jury, it is the District Court's responsibility to make a finding on any omitted issue of fact. Whether a party or both parties intended to submit the issue of fact to the

jury is of no consequence. Whether the omission occurred inadvertently, purposefully, or by some other reason, is simply irrelevant. It is the parties' responsibility to assure that all issues of fact which they desire to be submitted to the jury are, in fact, submitted to the jury. If a party agrees to the interrogatories as submitted, he cannot later complain if those interrogatories fail to include a question concerning an essential issue of fact. In such a case, the party has waived his right to a jury trial on any omitted issue of fact and it is for the Trial Court, under Rule 49(a), to make a finding on this omitted issue of fact.

As to the two cases cited by the Defendants as support for the existence of a conflict in the Circuits, these cases simply do not support the Defendants' position. In *In Re Randall*, 712 F.2d 1275 (8th Cir. 1983), the plaintiff had brought separate negligence and strict liability claims against the defendant. After plaintiff had presented her case in chief, the District Court directed a verdict for defendant on the plaintiff's negligence count. *Id.* at 1276. The jury was then charged on the issue of proximate causation, and this issue of fact along with the other issues of fact necessary to establish strict liability was submitted to the jury. However, separate interrogatories were not propounded, but the jury was generally asked to return a verdict on strict liability. *Randall v. Warnaco. Inc., Hirsch-Weis Div.*, 677 F.2d 1226 (8th Cir. 1982). The jury returned a general verdict finding no strict liability; however, while the factual issue of proximate cause was submitted to the jury, there was no way from this general verdict to determine what the jury's finding had been. The Eighth Circuit subsequently reversed the Trial Court and held that it had erred in failing to submit plaintiff's

negligence claim to the jury and remanded the case for a new trial. On remand, the defendant moved for summary judgment and the Trial Court invoked Rule 49(a) and made a finding in defendant's favor on the issue of proximate cause on the alleged basis that the jury had omitted such a finding in its original verdict on the strict liability count. The Eighth Circuit again reversed finding that the issue of proximate causation had, in fact, been specifically submitted to the jury, and that it was "erroneous to say that the parties had waived their right to a jury trial on the issue of proximate cause under the negligence count. The negligence count was withdrawn from the jury by the Trial Judge." *Id.* at 1277. The Court further noted,

> Rule 49(a) contemplates the trial judge making an omitted finding on the special verdict form *before* an entry of final judgment. At the time the trial court attempted to amend this special verdict, final judgment on the verdict had been previously entered in 1980 and the cause reversed and remanded for a new trial.

Id. at 1277 n. 3. In the present case, unlike *Randall*, the Court did not remove the strict liability claim or the asserted affirmative defense from the jury. The Court merely made a necessary factual determination with regard to the strict liability claim and the Defendants' affirmative defense, on "a factual question needed for a complete answer to the ultimate question." Rule 49(a). This is exactly the procedure followed by all the Circuits and it is not even remotely similar to the convoluted and improper procedure followed in *In Re Randall*.

In *Guidry v. Kem Manufacturing Co.*, 598 F.2d 402 (5th Cir. 1979), *reh. den.* 604 F.2d 320 (5th Cir. 1979), *cert. den.*,

445 U.S. 929 (1979), the jury was directly asked whether defendant Kem Manufacturing Co. was negligent. Unfortunately, the jury was asked this question twice. *Guidry v. Kem Mfg. Co.*, 598 F.2d 402 (5th Cir. 1979). In one question, the jury found that the defendant was not negligent and in another question the jury found that the defendant was negligent. The Fifth Circuit noted that application of Rule 49(a) was improper in this case since the question of whether the defendant was negligent was not omitted, but was asked twice with irreconcilably inconsistent answers. This case, therefore, simply had nothing to do with an omitted issue of fact, but rather involved irreconcilably inconsistent answers which required a retrial of the case.

In the present case, despite the Defendants' semantic arguments with regard to the words "frame" and "reframe," the Opinions of both the Trial Court and the Court of Appeals clearly demonstrate that the present case involves a straightforward application of Rule 49(a). The simple fact is and remains that "the jury was not given any question asking whether this feeder was the product of substantial work by more than one party." (A 34). All the Trial Court did was apply Rule 49(a) as it was meant to be applied, and made a finding with regard to this omitted issue of fact. This is precisely how Rule 49(a) was intended to be applied, and how it has been applied in all the Circuits. The present case, therefore, involves neither an important question of Federal Law, nor does it remotely concern a conflict among the Circuits.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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